mitting a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

Now I would like to say a word about s 397 of the Penal Code. In my view, s 397 of the Penal Code does not create any offence. Its sole purpose is to administer an additional penalty of whipping on the accused.

'The modern tendency of penal procedure and reform is certainly against the imposition of corporal punishment on adults as a retrograde measure ... we acknowledge – as, indeed, we must – the fact that there may be cases which justify the courts exercising the discretion, undoubtedly vested in them, of imposing a sentence of corporal punishment even though no actual violence or brutality may have been used. We emphasize, however, that even in such cases the court should consider long and anxiously before it exercises such a discretion. Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender.': per Thomson CJ in *Ho Kin Luan & Anor* v *PP*[12] at p 161. In *Yong Pak Yong* v *PP*,[13] it was held that in cases in which although no violence is actually used, or brutality actually shown, but where violence and brutality are undoubtedly involved (such as secret society extortion demands) the thug who has not had occasion to implement his threat of violence deserves corporal punishment just as much as if he had inflicted it.

I share those views mentioned above and I think they apply in this case. Therefore I accordingly sentence the second accused to a term of six years' imprisonment to run from and be back-dated to the date of his arrest and also to two strokes of whipping.

Order accordingly.

Solicitors: *Bachan & Kartar*; *Leonard Foo & Associate.*

Reported by *Ng Sheau Jiuan*

Ignatius Stephen Malanjum v Election Judge, Sabah & Anor

HIGH COURT (KOTA KINABALU) – ORIGINATING MOTION NO 8 OF 1988
MOHAMAD NOOR J
15 FEBRUARY 1989

Election – Election petition – Certiorari against decision of election judge – Prohibition against election judge from hearing petition – Leave to apply for – Court in which election judge sits – Whether it is an inferior court against which certiorari and prohibition can be issued – Election Offences Act 1954, ss 29, 33(1), (4) & 38(2) – Election Petition Rules 1954, r 21

Administrative Law – Certiorari against decision of election judge – Prohibition against election judge from hearing petition – Leave to apply for – Court in which election judge sits – Whether it is an inferior court against which certiorari and prohibition can be issued – Election Offences Act 1954, ss 29, 33(1), (4) & 38(2) – Election Petition Rules 1954, r 21

The applicant applied under O 53 r 1(2) of the Rules of the High Court 1980 for (a) leave to apply for an order of certiorari to quash the decision of the first respondent wherein he held that he had jurisdiction to hear Election Petition No 5 of 1985 and (b) leave to apply for an order of prohibition against the first respondent prohibiting him from hearing the said election petition. The question that came before the court was thus whether the court in which the election judge sits should, for the purposes of judicial review, be regarded as an inferior court.

Held, dismissing the application:

(1) It is manifestly clear from the relevant provisions of the Election Offences Act 1954 and the Rules that an election petition can be heard only by an election judge and by reason of expediency and convenience, other interlocutory matters in connection with an election petition including leave to amend or withdraw an election petition can be dealt with and decided by any judge of the High Court.

(2) The election judge sits in the High Court exercising his powers relating to election petitions in accordance with the election law, which is a special law. And he exercises his powers in the same jurisdiction and holds coordinate jurisdiction. Therefore the court in which the election judge sits is not an inferior court against which an order of certiorari or prohibition can be issued. The fact that under r 21, it appears that only a judge of the High Court can dispense with the required affidavit or cause shown does not alter the position because the rule is so enacted on account of expediency and convenience.

Cases referred to

1 *Re Perting Timor Election (No 2)* [1962] MLJ 333 (CA) (distd)
2 *Dason Gaban* v *Zulkifle bin Majun & 21 Other Cases* [1982] 1 MLJ 315 (FC) (distd)
3 *Tunku Abdullah* v *Ali Amberan* [1971] 1 MLJ 25 (FC) (distd)

Legislation referred to

Election Offences Act 1954 ss 29, 33(1), (4), 38(2)
Election Petition Rules 1954 r 21
Federal Constitution art 118
Rules of the High Court 1980 O 53 r 1(2)

Muhammad Shafee Abdullah (*Philip Lee* with him) for the applicant.

T Selventhiranathan (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Mohamad Noor J: This is an application by the applicant under O 53 r 1(2) of the Rules of the High Court 1980, for the following:

(i) leave to apply for an order of certiorari to quash the decision of the first respondent made on 30 June 1988, wherein he held that he had jurisdiction to hear the Election Petition No 5 of 1985; and

(ii) leave to apply for an order of prohibition against the first respondent prohibiting him from hearing the said election petition.

The issue before me is really a question of law, that is to say, whether leave to apply for prerogative writs, viz certiorari and prohibition, should be granted? This depends on the question whether ultimately this court has the jurisdiction to issue an order of certiorari to quash the relevant decision of the election judge and to issue an order of prohibition against the election judge prohibiting him from hearing the relevant election petition. The answer to that question really depends on whether the court in which the election judge sits should, for the purposes of judicial review, be regarded as an inferior court. And whether it should, for such purposes, be so regarded, is a matter which really depends on the relevant provisions of our law, viz the Federal Constitution and the Election Offences Act 1954 (Rev 1969), including the Rules made thereunder.

By reason of the provisions of art 118 of the Federal Constitution, the only method of challenging an election to the House of Representatives or to the Legislative Assembly of a state is by an election petition presented to the High Court having jurisdiction where the election was held. Under s 33(1) of the Election Offences Act, every election petition shall be tried by the Chief Justice or by a judge of any High Court nominated by the Chief Justice for the purpose, subject to the proviso thereunder. I have also scrutinized other provisions of the Act and the Rules made thereunder, in particular, ss 29, 33(4), 38(2) of the Act and r 21 of the said Rules. Under s 29, an election judge or a judge of the High Court may make exception in respect of innocent acts from being illegal practices, etc. Section 33(4) provides that unless otherwise ordered by the Chief Justice, all interlocutory matters in connection with an election petition may be dealt with and decided by any judge of the High Court whose decision shall be final. Under s 38(2), an election petition may be amended with the leave of a judge of the High Court. And under r 21, an election petition may be withdrawn only with leave of an election judge or a judge of the High Court except that a judge of the High Court may, on cause shown, dispense with the required affidavit. It is manifestly clear from the relevant provisions of the Act and the Rules that an election petition can be heard only by an election judge and by reason of expediency and convenience, other interlocutory matters in connection with an election petition including leave to amend or withdraw an election petition can be dealt with and decided by any judge of the High Court.

I have considered all the relevant features of the court in which the election judge sits including its constitution, jurisdiction and powers and its relationship with the High Court, in order to decide whether the court should properly be regarded as inferior to the High Court, so that its activities may appropriately be the subject of judicial review by the High Court. I am mindful, the fact that the High Court judge sits is not conclusive.

Having regard to the aforesaid provisions of the law, I conclude that the election judge sits in the High Court exercising his powers relating to election petitions in accordance with the election law, which is a special law. And he exercises his powers in the same jurisdiction and holds coordinate jurisdiction. Therefore, the court in which the election judge sits is not an inferior court against which an order of certiorari or prohibition can be issued. The fact that, under r 21, it appears that only a judge of the High Court can dispense with the required affidavit or cause shown does not alter the position because the rule is so enacted on account of expediency and convenience.

The learned applicant's counsel cited the following superior courts' authorities in support of his contention that the court in which an election judge sits is an inferior court to the High Court: *Re Perting Timor Election (No 2)*;[1] *Dason Gaban* v *Zulkifle bin Majun & 21 Other Cases*;[2] *Tunku Abdullah* v *Ali Amberan*.[3]

With due respect, those cases have no real bearing on the present case before me and they are not binding on me because they are concerned with the right of appeal which merits different consideration.

I need not consider the other aspect of the learned counsel's submission, that is to say, on the question of abatement.

Therefore, the application is hereby dismissed with costs.

Application dismissed.

Solicitors: *Richard Malanjum & Co.*

Reported by *Ng Sheau Jiuan*